

# Agency Fee Arrangements in Labor Agreements: No Harm in Holding Employers Harmless

## I. INTRODUCTION

### A. *The Increasing Importance of Nonmember Employees in Labor Negotiations and Contracts*

In the United States today there are “3 million people who work in a unionized business and pay union dues but do not choose to be a member of the union.”<sup>1</sup> The number of nonmember employees in traditional union jobs has grown steadily<sup>2</sup> since Congress began to pass laws providing for this employee status in the late 1940s,<sup>3</sup> and since the courts and right-to-

---

<sup>1</sup> Michael Kranish & Bruce Butterfield, *Political Funding by Unions Targeted; Bush signs U.S. Order on Using Member Dues*, BOSTON GLOBE, Apr. 14, 1992, at 3. “[T]wo distinct types of employees will most often decline to join the union representing their bargaining unit. The first includes those employees who are hostile to unions for political or ideological reasons. The second is typified by those . . . who do not want to pay any more for union representation than they are forced to, called ‘free riders.’” See Elena Matsis, *Procedural Rights of Fair Share Objectors after Hudson and Beck*, 6 LAB. LAW. 251, 267 (1990) (citing Posner, J., from *Gilpin v. American Fed’n of State Employees*, 875 F.2d 1310, 1313 (7th Cir.), *cert. denied*, 493 U.S. 917 (1989)).

<sup>2</sup> Growth in the number of nonmember employees is evidenced by a gradual decline in union membership that has been occurring since union membership reached its peak strength of 35% of the work force in 1946. See N. CHAMBERLAIN, ET AL., *THE LABOR SECTOR* 124 (3d ed. 1980). According to the Bureau of Labor Statistics, “[u]nion membership has been dropping as a percentage of the total work force since 1955, and in absolute numbers since 1979 . . . . In 1979, 22.6 million workers were union members; by [1991], membership had shrunk to 16.6 million.” Kenneth C. Crowe, *Labor in the ‘90s: A Special Report*, NEWSDAY, Sept. 6, 1992, at 100. Professor Seymour Lipset, a social scientist, “trie[d] to explain the sharp drop in union membership [in recent years] . . . [by suggesting] that [beginning] with [President] Reagan, there has been a return to ‘individualism,’ a ‘resurgence of traditional values,’ and a ‘new American patriotism,’ which has been fatal to organized labor.” THOMAS GEOGHEGAN, *WHICH SIDE ARE YOU ON? TRYING TO BE FOR LABOR WHEN IT’S FLAT ON ITS BACK* 266 (1991) (quoting Professor Lipset). The growth in the number of nonmember employees represents only a portion of the total drop in union membership as the decline also includes employment situations that have developed in which there is no union representation of employees at all.

<sup>3</sup> See ROBERT A. GORMAN, *BASIC TEXT ON LABOR LAW, UNIONIZATION, AND COLLECTIVE BARGAINING* 1, 6 (1976) (explaining the passage of the Taft-Hartley Act, Pub. L. 80-101, 61 Stat. 136 (1947), which provided for amending section 7 of the National Labor Relations Act (1935) to declare that closed shops were illegal, and allowing other states to outlaw union-security provisions with “right to work” laws); see also *Radio Officer’s Union of the Commercial Telegraphers Union v. NLRB*, 347 U.S. 17 (1954)

work advocates began working to ensure that the employees' constitutional rights regarding the choice not to join a union were protected.<sup>4</sup>

Supported by the National Right to Work Foundation,<sup>5</sup> nonmember employees have successfully used the judicial system to support their independent status in matters outside union bargaining. In 1988, the Supreme Court provided specific protection for private sector, nonmember employees in *Communications Workers of America v. Beck*,<sup>6</sup> when the Court prohibited the collection of fees from nonmember employees for

---

(utilizing the Labor Management Relations Act section 8(a)(3), 61 Stat. 136 (1947), to prevent the use of union security agreements for purposes other than to compel the periodic payment of union dues and initiation fees). Now these provisions are protected by the National Labor Relations Act, section 8(a)(3), 29 U.S.C. section 158(a)(3) (1988).

<sup>4</sup> See *Chicago Teachers Union v. Hudson*, 475 U.S. 292 (1986), *cert. denied*, 111 S. Ct. 2852 (1991); *Ellis v. Brotherhood of Ry. Clerks*, 466 U.S. 435, 447 (1984). See generally, *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 232 (1977).

Suits involving protection of employees' rights under agency shop agreements are commonly brought under 42 U.S.C. section 1983, which reads:

§ 1983. Civil action for deprivation of rights.

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

42 U.S.C. § 1983 (1988).

<sup>5</sup> See Milton L. Chappell, *From Abood to Tierney: The Protection of Nonunion Employees in an Agency Shop; You've Come a Long Way Baby*, 15 OHIO N.U. L. REV. 1 (1988). Mr. Chappell, senior staff attorney for the National Right to Work Legal Defense Foundation, describes the Foundation as "the organization which has provided the legal assistance to nonunion employees in most cases challenging the constitutionality of the agency shop." *Id.* at 1 n.1; see also *Gilpin v. American Fed'n of State Employees*, 875 F.2d 1310, 1315 (7th Cir.), *cert. denied*, 493 U.S. 917 (1989). According to Judge Posner, "only one challenger is necessary. And there will always be at least one . . . the National Right to Work Foundation will see to that . . ." *Id.*

<sup>6</sup> 487 U.S. 735, *cert. denied*, 487 U.S. 1233 (1988). The rights of public sector, nonmember employees have been protected under agency shop agreements since the Supreme Court decided *Abood* in 1977. See *Abood*, 431 U.S. at 209; *Ellis*, 466 U.S. at 435; *Hudson*, 475 U.S. at 292. The *Beck* decision guaranteed to private sector employees the same protection, allowing employees in the private sector to bring suits under 42 U.S.C. section 1983. *Beck*, 487 U.S. at 761.

union political contributions and costs unrelated to collective bargaining and contract administration. However, since *Beck*, Congress has taken no action to broaden the protection of nonmember employee rights, and the National Labor Relations Board (NLRB) has been slow in enforcing the *Beck* provided protections in “hundreds of cases . . . pending five to six years.”<sup>7</sup> Therefore, in April 1992, President Bush provided the impetus for a renewed focus on the rights of nonmember employees by signing Executive Order 12,800,<sup>8</sup> reminding federal employees<sup>9</sup> of their right to control union political contributions made from the fees collected from each employee.<sup>10</sup> The primary purpose of this Executive Order, was to enforce the protections of the *Beck* decision by “clarifying and . . . bringing up to date requirements for labor organizations to account for how workers’ dues are spent.”<sup>11</sup> The principal requirement of the President’s order was the mandatory posting of signs at work sites of federal contractors informing employees of their rights regarding payment of fees to the union.<sup>12</sup>

Though agreeing that the *Beck* decision was “fair,” and encouraging the incorporation of the Supreme Court’s findings into the fee collection practices of American labor unions,<sup>13</sup> President Clinton revoked Executive Order 12,800 on February 1, 1993.<sup>14</sup> The President justified the

---

<sup>7</sup> Robert Pear, *The 1992 Campaign: White House; Bush Attacks Way Unions are Using Nonmembers’ Fees*, N.Y. TIMES, Apr. 12, 1992 at 1. Jerry M. Hunter, general counsel for the NLRB, explained that the slow reaction from the Board in enforcing the Court’s decision in *Beck* can be attributed to the fact that “the Court created a whole new area of the law, and it took some time for [the agency] to plow through all the cases that were pending at the [B]oard . . . [awaiting] the outcome of the *Beck* case . . . .” *Id.*

<sup>8</sup> Exec. Order No. 12,800, 57 Fed. Reg. 12,985 (1992).

<sup>9</sup> The President’s authority extended only to federal employees and those performing federal contract work. Remarks on Signing the Executive Order on Employee Rights Concerning Union Dues, 16 WEEKLY COMP. PRES. DOC. 644 (Apr. 13, 1992).

<sup>10</sup> President Bush indicated that his intention in signing this order was “to strengthen the political rights of American workers . . . [and to protect] . . . American workers from being compelled against their will to pay union or agency dues in excess of what is actually used for collective bargaining purposes and contract administration.” *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> Frank Swoboda, *Labor Board to Address Dues Issue; NLRB to Determine Disclosure Guidelines*, WASH. POST, May 5, 1992, at C1.

<sup>13</sup> President Clinton made these remarks during his campaign in a statement released after the signing of Executive Order 12,800. Scot Lehigh, *Clinton Sees Bush Decree as “Politics,”* BOSTON GLOBE, Apr. 15, 1992, at 20.

<sup>14</sup> Exec. Order No. 12,836, 58 Fed. Reg. 7045 (1993).

elimination of the order based upon its failure to serve the public good.<sup>15</sup> The order had placed tremendous monetary and paperwork burdens on unions while providing no additional protection to the employee beyond the rights that were already guaranteed by the Supreme Court.<sup>16</sup>

Despite the executive disagreement that has arisen over the most effective method to employ in notifying nonmember employees of their rights concerning union contributions, there is a shared acknowledgment that protection of the nonmembers' rights is essential. With this current emphasis on the nonmember employee, employers and unions must pay significant attention to the rights<sup>17</sup> of these employees in negotiations and in the formulation of agreements.

### *B. Hold Harmless Provisions in Labor Agreements and the Effect of These Provisions on Nonmember Employees*

A new consideration in the drafting of labor agreements requires that a decision be made concerning whether to include hold harmless provisions in union-management agreements. Recent litigation has brought into question the validity of hold harmless agreements between the union and the employer when the provision is designed to hold the employer harmless for violations resulting from the incorrect collection of fees from

---

<sup>15</sup> *Id.*

<sup>16</sup> Since the issuance of Executive Order 12,800, union leaders had voiced concern that the order had "little actual effect—except to create bookkeeping hassles" by requiring new, more detailed reporting to the U.S. Department of Labor and merely enforcing spending requirements already established in *Beck*. Michael Remez, *Bush Order on Union Dues Can Look Like Real Progress — Or Politics*, HARTFORD COURANT, Apr. 20, 1992, at 3.

<sup>17</sup> Particularly, the First Amendment rights of freedom of expression and association, and due process rights guaranteed by the Fourteenth Amendment. *Chicago Teachers Union v. Hudson*, 475 U.S. 292 (1986), *cert. denied*, 111 S. Ct. 2852 (1991). *See Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 213 (1977). These rights are not violated by requiring a nonmember employee to pay fair share fees. *See infra* note 23. However, the rights are violated when excessive or improper dues are collected, such as requiring payment of fees to finance political or ideological causes to which the nonmember employee is opposed. *Abood*, 431 U.S. at 235. A union's authority to obtain employees' dues is grounded directly on federal authority so as to satisfy the First Amendment "state action" requirement even when private sector employees are those affected by union collections. *Beck v. Communications Workers of Am.*, 776 F.2d 1187, 1195–1208 (4th Cir. 1985), *aff'd*, 487 U.S. 735, *cert. denied*, 487 U.S. 1233 (1988) (guaranteeing protection to private sector employees under 42 U.S.C. § 1983).

nonmember employees.<sup>18</sup> The circuit courts are currently divided about whether hold harmless clauses used in this context are, in fact, valid and enforceable provisions when included in labor agreements.<sup>19</sup> At the heart of the debate is the argument over whether hold harmless provisions obstruct the protection of nonmember employees' rights by relieving the employer of any incentive to protect the nonmember.<sup>20</sup> Alternatively, hold harmless clauses have been described as an efficient and effective means for ensuring that both the employer and the union meet respective duties to the nonmember employee.<sup>21</sup>

The purpose of this Comment is to explore the discrepancy in the holdings of the different circuit courts and to emphasize the importance of developing a policy regarding indemnification on which drafters, cognizant of nonmember employees' rights, can rely in formulating future collective bargaining agreements. Specifically, this Comment identifies the differences between the various circuit courts that have addressed hold harmless provisions, discusses precedents in other labor contexts that may assist in reconciling the differences between the circuits, and examines bargaining circumstances that prohibit a universal or automatic bar to the use of hold harmless clauses in labor agreements.

### C. *The Weaver Decision*

In *Weaver v. University of Cincinnati*,<sup>22</sup> the Sixth Circuit recently decided that it was the duty of both the employer and the union to assure that only fair share fees<sup>23</sup> were deducted from the pay of nonmember

---

<sup>18</sup> Compare *Weaver v. University of Cincinnati*, 970 F.2d 1523 (6th Cir. 1992), *cert. denied*, 113 S. Ct. 1274 (1993) (holding that hold harmless clauses are violative of public policy and not enforceable) with *Hohe v. Casey*, 956 F.2d 399, 405 (3d Cir. 1992) (holding that hold harmless clauses are valid and enforceable).

<sup>19</sup> See *supra* note 18; see also *infra* notes 28–29 and accompanying text.

<sup>20</sup> *Weaver*, 970 F.2d at 1538 (referring to *Cramer v. Matish*, 1990 WL 169640 at \*4 (6th Cir. Nov. 2, 1990)).

<sup>21</sup> *Hohe*, 956 F.2d at 412.

<sup>22</sup> 970 F.2d 1523 (6th Cir. 1992), *cert. denied*, 113 S. Ct. 1274 (1993).

<sup>23</sup> Fair share fees are fees paid by a nonmember employee to the union to cover the benefits of union bargaining on the employee's behalf and union administration of the contract. These contributions have been found constitutionally valid. See generally *Chicago Teachers Union v. Hudson*, 475 U.S. 292 (1986), *cert. denied*, 111 S. Ct. 2852 (1991); *Ellis v. Brotherhood of Ry. Clerks*, 466 U.S. 435 (1984); *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209 (1977). The Supreme Court has defined the test used to decide whether a union cost can be deducted as a portion of fair share fees as "whether the . . . expenditures are necessarily or reasonably incurred for the purpose of performing the duties of an

employees.<sup>24</sup> Specifically, the court found that a “hold-harmless” clause<sup>25</sup>

---

exclusive representative of the employees in dealing with the employer on labor-management issues . . . [including] direct costs . . . and expenses of activities or undertakings normally or reasonably employed to implement or effectuate the duties of the union . . . .” *Ellis*, 466 U.S. at 448. Therefore, funds collected for the purpose of advancing the political or ideological ideas of the union are prohibited from being deducted as fair share contributions from nonmember employees.

Some specific examples of contributions that fit this category and, therefore, would not be considered valid deductions as fair share fees include costs associated with:

1. efforts on behalf of individual political candidates or political parties,
2. supporting and contributing to charitable organizations which have no employment related basis or benefit to the local organization,
3. training sessions for individuals to work on local political campaigns,
4. training in voter registration, get-out-the-vote and campaign techniques,
5. political action committees and the staff and salary for such activities.

Richard J. Darko & Janet C. Knapp, *Legal Problems in Administering Agency Shop Agreements — A Union Perspective*, 13 J.L. & EDUC. 77, 84-85 (1984).

Agreements providing for the payment of nonmember fees will be called agency shop agreements, union security agreements, and fair share fee arrangements interchangeably throughout this Comment.

<sup>24</sup> *Weaver*, 970 F.2d at 1536. Union shop agreements, requiring an employee to join the union after thirty days of employment, are permissible in Ohio, inasmuch as Ohio has not adopted a right-to-work statute. GORDON E. JACKSON, *LABOR & EMPLOYMENT LAW DESK BOOK* 713 (1986). However, *Weaver* involved an agency shop agreement that required the payment of fair share dues after 60 days of employment, but did not require union membership. *Weaver*, 970 F.2d at 1525. The reason for the agency shop agreement is that the University of Cincinnati is a public employer and section 4117.03 of the Ohio Revised Code provides that public employees have the right not to join a union.

#### § 4117.03 Public employees rights.

(A) Public employees have the right to:

(1) Form, join, assist, or participate in, or *refrain* from forming, *joining*, assisting, or participating in . . . any employee organization of their own choosing.

OHIO REV. CODE ANN. § 4117.03 (Anderson 1991) (emphasis added).

Further, even when union membership is required by agreement, what constitutes membership has been “whittled down to its financial core” and requires merely paying fair share fees. *Communications Workers of Am. v. Beck*, 487 U.S. 735, 745, *cert. denied*, 487 U.S. 1233 (1988) (quoting *NLRB v. General Motors Corp.*, 373 U.S. 734, 742 (1963)).

It is also possible to have agency fee agreements in the private sector, and for

in the agreement between the union and the university, in which the union agreed to indemnify the university for costs and penalties associated with the violation of a fair-share arrangement, was void as against public policy.<sup>26</sup> The court was concerned that an employer relieved of “all consequences for its failure to assume and conscientiously carry out its duties” to nonmember employees would not give the necessary attention to the performance of these duties.<sup>27</sup>

#### D. *The Importance of a Consistent National Labor Policy*

The Sixth Circuit’s strong stand against upholding labor agreement provisions that allow a union to hold an employer harmless when an employee’s rights have been violated by a fair-share arrangement, though supported by some circuit courts,<sup>28</sup> is in conflict with other circuits that

---

employees working for private employers to bring claims for violations of employees’ rights under 42 U.S.C. section 1983. *Beck*, 487 U.S. at 761. For instance, Ohio’s collective bargaining laws include agency shop agreements among the subjects that a union can negotiate or obtain. Hugh D. Jascourt, *Legal Problems in Administering Agency Shop Agreements*, 13 J.L. & EDUC. 59 (1984).

<sup>25</sup> The hold harmless provision appeared in article IV, section 3, of the collective bargaining agreement and read:

##### Section 3. Hold Harmless.

The Union further agrees to save the University harmless from any legal action growing out of these checkoff deductions that may be instituted by an employee involved therein before a court, or any other body asserting or having jurisdiction, against the University as well as reasonable costs and expenses involved in defense of any such action . . . .

*Weaver*, 970 F.2d at 1525.

<sup>26</sup> *Id.* at 1538.

<sup>27</sup> *Id.* at 1538 (emphasis added).

<sup>28</sup> See *Cramer v. Matish*, 1990 WL 169640 at \*4 (6th Cir. Nov. 2, 1990) (holding that hold harmless provisions in labor agreements violate public policy); see also *Patterson v. American Tobacco Co.*, 535 F.2d 257, 270 (4th Cir.), *cert. denied*, 429 U.S. 920 (1976) (finding that a union may not bargain away employees’ rights through the use of an indemnity provision); *Lachman v. Sperry-Sun Well Surveying Co.*, 457 F.2d 850, 854 (10th Cir. 1972) (explaining that public policy prohibits the enforcement of contracts or agreements that function to harm third parties). See generally *Stamford Bd. of Educ. v. Stamford Educ. Ass’n*, 697 F.2d 70 (2d Cir. 1982) (holding that an employer will lack concern for protecting a nonmember’s constitutional rights if the employer will be indemnified for any loss resulting from the violation).

have considered this matter.<sup>29</sup> In describing the function of a collective bargaining agreement and its provisions, the Supreme Court has explained that an agreement "is more than a contract; it is a generalized code to govern a myriad of cases which draftsmen cannot wholly anticipate."<sup>30</sup> Therefore, "[i]n defining the relationships created by such an agreement, the Court has applied an evolving federal common law grounded in national labor policy."<sup>31</sup> Accordingly, the Supreme Court has established that in a labor context, it is necessary to have a consensus on policy upon which future agreements can be based.<sup>32</sup>

## II. CIRCUIT COURT DECISIONS REGARDING HOLD HARMLESS PROVISIONS

### A. *The Sixth Circuit Ban on Hold Harmless Provisions*

In *Weaver*, the Sixth Circuit based its holding on the precedent established in *Chicago Teachers Union v. Hudson*,<sup>33</sup> a Supreme Court

---

<sup>29</sup> See *Hohe v. Casey*, 956 F.2d 399 (3d Cir. 1992) (holding that hold harmless provisions do not violate public policy); see also *Solo Cup Co. v. Federal Ins. Co.*, 619 F.2d 1178 (7th Cir.) (likening hold harmless clauses to insurance policies and finding the provisions not violative of public policy), *cert. denied*, 449 U.S. 1033 (1980); *Caplan v. Johnson*, 414 F.2d 615 (5th Cir. 1969) (holding that hold harmless clauses function as insurance policies which have been found not to violate public policy).

<sup>30</sup> *Bowen v. United States Postal Serv.*, 459 U.S. 212, 224 (1983) (quoting *Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 578 (1960)).

<sup>31</sup> *Bowen*, 459 U.S. at 224, 225; see also *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448 (1957) (holding that section 301 of the Labor Management Relations Act authorized federal courts to develop a federal common law regarding enforcement of collective bargaining agreements); *Howard Johnson Co. v. Hotel Employees Int'l Union*, 417 U.S. 249, 255 (1974) (quoting *Textile Workers*).

<sup>32</sup> See *supra* note 31; see also Clyde W. Summers, *Labor Law as the Century Turns: A Changing of the Guard*, 67 NEB. L. REV. 7, 14-15 (1988). Professor Summers, Fordham Professor of Law, University of Pennsylvania, suggests that this consensus must be established in the courts because there is an "increasing reliance on the law to regulate the labor market" and that the focus of this judicial and legislative regulation is on personal rights of employees. *Id.* at 16. It is unlikely that the NLRB will be the only force in establishing this policy because federal courts have jurisdiction over agency fee claims concerning breaches of the duty of fair representation and violations of employees' First Amendment rights. The primary jurisdiction of the NLRB is limited to strict National Labor Relations Act section 8(a)(3) claims. See *Communications Workers of Am. v. Beck*, 487 U.S. 735, 742, *cert. denied*, 487 U.S. 1233 (1988).

<sup>33</sup> 475 U.S. 292 (1986), *cert. denied*, 111 S. Ct. 2852 (1991).



decision that is often cited as the foundation of the agency shop agreement.<sup>34</sup> In *Hudson*, the Court outlined the constitutional requirements for the union collection of fees from nonunion employees.<sup>35</sup> In doing so, the Court indicated that the public employer has the primary duty to ensure that the deduction plan for fair-share fees is constitutionally valid.<sup>36</sup> Therefore, the *Weaver* court determined that allowing an employer to be completely indemnified for constitutional violations of employees' rights would be contrary to public policy.<sup>37</sup> The Sixth Circuit had demonstrated its intention to follow the *Hudson* decision five years before its holding in *Weaver*.<sup>38</sup> On this basis, the decision in *Weaver* was clearly foreseeable.

### B. The Third Circuit—Constitutionality Is a Union Duty

However, only a few months before the *Weaver* decision, the Third Circuit interpreted *Hudson* as requiring that the union and the employer have a constitutional procedure in place for deducting fees, but rejected that *Hudson* had specified that the employer must have established the constitutionality of the procedure before deductions were made.<sup>39</sup> Following this interpretation, the Third Circuit held that the employer can delegate the overseeing of constitutionality to the union because the union "has a significant incentive to ensure that its procedures comply with the

---

<sup>34</sup> The Supreme Court first found that agency shop requirements in the public sector were constitutional in *Abood*. See Chappell, *supra* note 5, at 1 (citing *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209 (1977)). However, it was not until the Court decided *Hudson*, nine years later, that employees were provided with a "concrete means to effectuate their constitutional right to refrain from supporting the vast noncollective bargaining pursuits of labor unions." *Id.* at 3 (citing *Hudson*, 475 U.S. at 292).

<sup>35</sup> *Hudson*, 475 U.S. at 310. Constitutional requirements include "an adequate explanation of the basis for the fee, a reasonably prompt opportunity to challenge the amount of the fee . . . and an escrow for the amounts reasonably in dispute while such challenges are pending." *Id.*

<sup>36</sup> *Weaver v. University of Cincinnati*, 970 F.2d 1523, 1537 (6th Cir. 1992), *cert. denied*, 113 S. Ct. 1274 (1993) (citing *Hudson v. Chicago Teachers Union*, 743 F.2d 1187, 1192 (7th Cir. 1984), *aff'd*, 475 U.S. 292 (1986), *cert. denied*, 111 S. Ct. 2852 (1991)).

<sup>37</sup> *Id.* at 1538.

<sup>38</sup> See *Tierney v. City of Toledo*, 824 F.2d 1497 (6th Cir. 1987) (emphasizing the court's intention to follow *Hudson* in the Sixth Circuit). "[Public employers] owe a duty [to their] nonunion employees to assure that [their] ordinances [and agreements] will not permit the union to deprive [employees] of their rights under the First and Fourteenth Amendments." *Id.* at 1505 (citing *Hudson*, 475 U.S. at 307–08 n.20).

<sup>39</sup> *Hohe v. Casey*, 956 F.2d 399, 405 (3d Cir. 1992).

Constitution.”<sup>40</sup> Therefore, the Third Circuit found hold harmless clauses<sup>41</sup> pertaining to fair-share fee arrangements valid, and not violative of an employee’s First Amendment rights.<sup>42</sup>

### C. Employer Incentives to Protect Nonmembers’ Rights

The Sixth Circuit explained the discrepancy of its holding with that of the Third Circuit based upon the fact that in *Hohe* the hold harmless provision did not cover the costs of defending a suit for violations of constitutional requirements.<sup>43</sup> The rationale underlying this justification is that the cost of defending a suit makes an employer more attentive to its duty to uphold the constitutionality of the fees being deducted.<sup>44</sup> Though the threat of having to pay large attorney’s fees and court costs may work as a strong incentive for an employer to avoid violating nonmembers’ rights, it is not the only deterrent that will provide for this protection. In fact, the *Hohe* court specifically rejected the argument that the cost of defending a suit is a necessary deterrent to the employer, stating that “even if [the union] would indemnify the [employer] for such costs and fees under [an indemnification] clause, we do not believe that this should matter.”<sup>45</sup>

One basic justification for allowing indemnification is that regardless of whether the employer faces the monetary costs of a trial, litigation is never without costs. The cost of litigation cannot be measured in monetary terms alone, but also includes intangible costs associated with “the injury it brings to organizational morale and the diversion that it requires of

---

<sup>40</sup> *Id.* at 412.

<sup>41</sup> The hold harmless provision in *Hohe* read: “The Union shall indemnify and hold the Employer harmless against any and all claims, suits, orders, or judgments brought or issued against the Employer as a result of the action taken or not taken by the Employer under the provisions in this Article.” *Hohe*, 956 F.2d at 411.

<sup>42</sup> The court did acknowledge, however, that “[t]he indemnification clause [did] not immunize the [employer]. The [employer] may be called upon to defend the deduction of fees and may be enjoined from imposing the fair share fees on nonmembers when it is determined that the exclusive representative has not complied with the constitutional requirements.” *Id.* at 411.

<sup>43</sup> *Weaver v. University of Cincinnati*, 970 F.2d 1523, 1537 (6th Cir. 1992) *cert. denied*, 113 S. Ct. 1274 (1993).

<sup>44</sup> *See Tierney v. City of Toledo*, 824 F.2d 1497 (6th Cir. 1987); *Stamford Bd. of Educ. v. Stamford Educ. Ass’n*, 697 F.2d 70 (2d Cir. 1982); *Dixon v. City of Chicago*, 669 F. Supp 851, 852 (N.D. Ill. 1987).

<sup>45</sup> *Hohe*, 956 F.2d at 412.

management time and talent.”<sup>46</sup> Therefore, an incentive to avoid litigation exists for prudent business managers, regardless of whether monetary costs are involved. In a labor setting, the issues of employee morale and loyalty alone provide a strong incentive for the employer to avoid litigation by ensuring that an employee’s rights are protected.

However, should the functional incentives prove to be too weak a stimulus to ensure employer protection of nonmembers’ rights, stronger employer incentives also exist. The maintenance of labor management relations and the monetary costs that are associated with intentional violations of employer-assigned duties also function as an impetus for the employer to meet its duty to the nonmember employee.<sup>47</sup> Employers are never without incentives to protect nonmembers’ rights even when hold harmless provisions are included in labor agreements.

### III. EXISTING NATIONAL LABOR POLICY

#### A. *Employer Reliance on the Union in the Protection of Employee Rights*

In other labor contexts, the Supreme Court has made the union responsible for protecting employees’ rights and has allowed the employer to rely on the union’s decisions in matters affecting employees.<sup>48</sup> Explaining the union duty in a union-management relationship, Justice Powell stated that: “By seeking and acquiring the exclusive right and power to speak for a group of employees, the union assumes the corresponding duty to discharge the responsibility faithfully—a duty which it owes to the employees whom it represents and on which the employer with whom it bargains may *rely*.”<sup>49</sup> The justification for this stance is that “requiring the union to pay damages . . . provide[s] an additional incentive for the union” to protect the employee.<sup>50</sup> However, in applying this principle, the courts have acknowledged that the employer and union have individual obligations to employees, and that each is responsible for

---

<sup>46</sup> ROBERT W. HAMILTON, *CASES AND MATERIALS ON CORPORATIONS INCLUDING PARTNERSHIPS & LIMITED PARTNERSHIPS* 1148 (4th ed. 1990).

<sup>47</sup> See Parts III and IV of this Comment for further development and discussion of these incentives.

<sup>48</sup> See *Clayton v. Automobile Workers*, 451 U.S. 679, 686–687 (1981) (allowing an employer to rely on the union’s decision regarding processing of grievances).

<sup>49</sup> *Bowen v. United States Postal Serv.*, 459 U.S. 212, 227 (1983).

<sup>50</sup> *Vaca v. Sipes*, 386 U.S. 171, 187 (1967).

damages caused by the violation of an employee's constitutional rights.<sup>51</sup> In fact, the Supreme Court in *Bowen* specifically warned that imposing total liability on the employer, while excusing the union, would be antithetical to achieving the goal of ensuring that an employee's rights are protected.<sup>52</sup>

Several circuit courts that have addressed the respective obligations of employers and unions regarding employees' rights have applied a *Bowen*-type rationale to the corresponding situation in which the union, alone, would be held responsible for damages.<sup>53</sup> These courts have explained that in a suit between the employee and the union, if a hold harmless provision in a labor agreement requires the union to pay for damages to an employee caused by a violation of the employee's rights regardless of the outcome, then the union has no incentive to pursue claims arising from this litigation against an employer.<sup>54</sup> Under these conditions, courts assume that an employer will become lax in its protection of the employee because the union has assumed sole responsibility for any damages.<sup>55</sup> The courts warn that the same danger of violation that exists when the employer is given the sole responsibility of protecting employees' rights will also exist when this duty is completely delegated to the union through a hold harmless provision.<sup>56</sup> Yet, current labor policy may require the employer to rely on the union in regard to the protection of nonmember employees' rights.<sup>57</sup>

---

<sup>51</sup> See *Bowen*, 459 U.S. at 227 (interpreting *Vaca* to require allocation of responsibilities between the employer and the union).

<sup>52</sup> *Id.*

<sup>53</sup> See *Lachman v. Sperry-Sun Well Surveying Co.*, 457 F.2d 850, 854 (10th Cir. 1972); see also *Stamford Bd. of Educ. v. Stamford Educ. Ass'n*, 697 F.2d 70 (2d Cir. 1982) (presenting a civil rights parallel). See generally *Professional Beauty Supply, Inc. v. National Beauty Supply, Inc.*, 594 F.2d 1179, 1186-87 (8th Cir. 1979) (presenting an antitrust parallel).

<sup>54</sup> See *Lachman*, 457 F.2d at 854; see also *Professional Beauty Supply*, 594 F.2d at 1186-87. This situation would only occur when the employee sued the union directly, and the employer was not joined. Therefore, the employer would have no monetary or other litigation costs.

<sup>55</sup> *Weaver v. University of Cincinnati*, 970 F.2d 1523, 1538 (6th Cir. 1992), cert. denied, 113 S. Ct. 1274 (1993).

<sup>56</sup> Compare *Bowen*, 459 U.S. at 227 (explaining that the employer should not be given the sole responsibility for protecting employees' rights) with *Weaver*, 970 F.2d at 1538 and *Lachman*, 457 F.2d at 854 and *Stamford*, 697 F.2d at 70 (explaining that the union should not be given the sole responsibility for protecting employees' rights).

<sup>57</sup> See *infra* notes 58-73 and accompanying text.

## B. Labor Decisions Construed with Reference to Existing Federal Labor Policy—Necessary Hold Harmless Provisions

Labor decisions cannot exist in isolation, but must encompass an overall labor policy that reflects general social and political values.<sup>58</sup> Therefore, to guarantee a cohesive labor policy, the courts, in considering the validity of a hold harmless provision in a labor agreement, must look to other areas of labor law that tangentially affect or are affected by the decision at hand.

### 1. Agency Fees as a Nonmandatory Subject of Bargaining

In 1990, the D.C. Circuit held that the amount of the agency fee is not a mandatory<sup>59</sup> subject of bargaining.<sup>60</sup> Specifically, the court found that “the amount of an agency fee concerns primarily the relationship between the union and the nonmember employees; it is not ‘an aspect of the relationship between the employer and employees’ . . . [and therefore] . . . is not a mandatory subject of bargaining . . . .”<sup>61</sup> Because this bargaining subject is not mandatory, the union is not required to disclose to the employer the financial information upon which the agency fee is based during bargaining and formulation of the agreement.<sup>62</sup> It follows that the

---

<sup>58</sup> Summers, *supra* note 32, at 19. The Supreme Court has instructed that labor decisions must be made *in pari materia* (construed with reference to) other labor legislation and judicial decisions. See *Guidry v. Sheet Metal Workers Nat’l Pension Fund*, 493 U.S. 365 (1990).

<sup>59</sup> Bargaining subjects are either mandatory or permissive depending on the nature of the issue. See *NLRB v. Wooster Div. of Borg-Warner Corp.*, 356 U.S. 342 (1958). See generally *Allied Chem. & Alkali Workers, Local Union No. 1 v. Pittsburgh Plate Glass Co.*, 404 U.S. 157, 178 (1971).

<sup>60</sup> *North Bay Dev. Disabilities Servs., Inc. v. NLRB*, 905 F.2d 476 (D.C. Cir. 1990), *cert. denied*, 498 U.S. 1082 (1991). The D.C. Circuit first established that agency fees were not a mandatory subject of bargaining in 1982. See *International Union of the United Ass’n of Journeymen of Plumbing Indus. v. NLRB*, 675 F.2d 1257 (D.C. Cir. 1982), *cert. denied*, 459 U.S. 1171 (1983).

<sup>61</sup> *North Bay*, 905 F.2d at 478 (quoting *Allied Chem. & Alkali Workers*, 404 U.S. at 178).

<sup>62</sup> *Id.* at 479. However, the calculation of the fair share must be verified by an independent auditor, so there is a guarantee beyond the union representation that ensures that the amount deducted from a nonmember’s pay is correct. See *Chicago Teachers Union v. Hudson*, 475 U.S. 292, 307 n.18 (1986), *cert. denied*, 111 S. Ct. 2852 (1991); see also *Tierney v. City of Toledo*, 824 F.2d 1497, 1504 (6th Cir. 1987); *Lowary v. Lexington Local Bd. of Educ.*, 704 F. Supp. 1430, 1445 (N.D. Ohio 1987) (describing *Tierney* as

employer deprived of the information under these conditions should be allowed to protect itself through a valid hold harmless provision in the final agreement.<sup>63</sup>

The nonmember employee is protected, regardless of the lack of involvement by the employer, because the courts have required the union to provide the employees with professionally audited financial information concerning the deduction of agency fees directly before the deduction is made.<sup>64</sup> Therefore, the union<sup>65</sup> and employer would agree that the primary duty to enforce the nonmember's rights lies with the union, and that hold harmless clauses between the union and the employer may not only be valid, but also necessary given these circumstances.<sup>66</sup>

---

requiring a detailed accounting by the union and the auditor explaining the calculation of agency fees), *cert. denied*, 498 U.S. 958 (1990). Further, the union is required to provide an "adequate disclosure" of expenditures and an explanation of the basis for the fee to nonmembers before collecting any fees. *Hudson*, 475 U.S. at 307 n.18.

<sup>63</sup> The courts have not yet addressed whether a hold harmless provision would be valid under these circumstances. *Weaver*, decided later, did not consider *North Bay* when holding that hold harmless clauses were per se violative of public policy when applied to agency fee situations. *See Weaver v. University of Cincinnati*, 970 F.2d 1523 (6th Cir. 1992), *cert. denied*, 113 S. Ct. 1274 (1993).

<sup>64</sup> *Hudson*, 475 U.S. at 307 n.18. For a detailed discussion of the federal courts' interpretation of what is needed to meet the notice and disclosure requirements, and the expenditure disclosure requirements under *Hudson*, see Matsis, *supra* note 1, at 275-79.

<sup>65</sup> The union would rather be responsible directly to the nonmember employee for meeting its existing duty to disclose financial information than be forced to endure an additional and unnecessary burden of providing like information to the employer. Unions and union supporters have adamantly opposed additional regulations on labor relations and are willing to take on the primary duty of protecting and bargaining for all employees. *See Kranish & Butterfield, supra* note 1. Senator Edward Kennedy objecting to Executive Order No. 12,800 stated that "imposing burdensome new regulations on labor . . . [is] unfair . . . ." *Id.*; *see also Remez, supra* note 16 at 3. "Union leaders have argued that the new reporting requirements will impose another paperwork burden." *Id.*; *see also GEOGHEGAN, supra* note 2, at 251. Taking this idea to the extreme, Lane Kirkland, President of the AFL-CIO, called for the repeal of all labor laws several years ago, insisting that employers and unions could effectuate better agreements for the employer, union, and the employee without the current laws and regulations, which are often ignored. *Id.*

<sup>66</sup> *See infra* notes 68-81, explaining the need for indemnification provisions arising in circumstances that deprive the employer of information necessary to protect the nonmembers' rights.

## 2. *Preservation of the Employment Relationship—Necessary Employer Reliance on Union Representations*

In a context similar to the decision in *North Bay*, the First Circuit held that an employer could rely on the union to carry out its duty to the employee.<sup>67</sup> The court explained that to prohibit the employer from relying on the union would require that in order “[t]o protect itself from . . . liability . . . an employer would be forced to ignore union representations and take the initiative in dealing with employees whenever it suspect[ed] a discriminatory motive. Such conduct would . . . have a . . . detrimental effect on labor-management relations . . . .”<sup>68</sup>

Thus, a possible consequence of prohibiting hold harmless provisions, although allowing the union to withhold information concerning the fairness of pay deductions, would be the weakening of the framework upon which union-management relations are based.<sup>69</sup> Under these circumstances, the union would no longer operate as the sole representative of the employees because the employer would now be directly responsible for nonmember employees. The employer would be required to establish independently, and upon its own initiative, that the fees being deducted were fair to the nonmember.<sup>70</sup> Not only does this requirement create an insurmountable burden for the employer,<sup>71</sup> but also jeopardizes the

---

<sup>67</sup> *Carrol v. Brotherhood of R.R. Trainmen*, 417 F.2d 1025, 1028 (1st Cir. 1969), *cert. denied*, 397 U.S. 1039 (1970).

<sup>68</sup> Charles A. Edwards, *Employers' Liability for Union Unfair Representation: Fiduciary Duty or Bargaining Reality?*, 27 LABOR L.J. 686, 687 (1976) (citing *Carroll v. Brotherhood of R.R. Trainmen*, 417 F.2d 1025, 1028 (1st Cir. 1969), *cert. denied*, 397 U.S. 1039 (1970) and describing the harm of holding the employer responsible for inadvertent participation in the union's discriminatory practice against an employee in an unfair representation case).

<sup>69</sup> A judicial pronouncement holding the employer liable for the accuracy of information provided to it by the union has been likened to a Damoclean sword hanging over the entire employment relationship. Edwards, *supra* note 68, at 687. Damocles was a “courtier of ancient Syracuse held to have been seated at a banquet beneath a sword hung by a single hair.” WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 323 (1985).

<sup>70</sup> Edwards, *supra* note 68. This may require the employer to obtain the services of an additional independent auditor to verify the fairness of the fees. See *Chicago Teachers Union v. Hudson*, 475 U.S. 292, 307 n.18 (1986) (requiring verification of the fees by an independent auditor), *cert. denied*, 111 S. Ct. 2852 (1991).

<sup>71</sup> The employer is not privy to all financial information held by the union and, even with an auditor, is likely to have an incomplete set of figures upon which to base the accuracy of the agency fee deduction. Only “the unions possess the facts and records from which . . . expenditures can reasonably be calculated . . . .” *Aboud v. Detroit Bd. of Educ.*,

constitutionality of the security arrangement.

The Supreme Court has found that a nonmember's rights are not violated when that employee is forced to pay his fair share of the *union* costs of bargaining.<sup>72</sup> However, should the bargaining relationship change so that the *employer* is charged with the duty and cost of representing the nonmember employee in the bargaining process independently, the deduction of the agency fee for this service would be constitutionally questionable. Under this scenario, the union has allowed the duty of nonmember bargaining to be shifted to the employer,<sup>73</sup> and therefore, should no longer be allowed to collect bargaining fees from the nonmember.<sup>74</sup>

### 3. *Employer Protection—Inherent and Express*

To avoid a potential conflict in the employment relationship, the court in *North Bay* found an inherent protection to the employer, similar to one expressly agreed to in a hold harmless provision, in situations in which the union is allowed to withhold agency fee information from the employer.<sup>75</sup> The court emphasized that the employer is protected from charges of unfair labor practices when it relies on the agency fee deduction that is provided by the union, and therefore, would not have to initiate its own procedure for guaranteeing the accuracy of the fee.<sup>76</sup>

However, the existence of this protection does not completely relieve

---

431 U.S. 209, 239–40 n.40 (1977).

<sup>72</sup> See *Hudson*, 475 U.S. at 301; *Ellis v. Brotherhood of Ry. Clerks*, 466 U.S. 435, 447 (1984); *Abood*, 431 U.S. at 232.

<sup>73</sup> This shift is not an outcome that the union would favor because unions have traditionally considered employees to be "property of the union" and would not look positively on relinquishing this control. See generally *Goodbye to All That; Decline of Labor Union Influence*, NAT'L REV., May 11, 1992, at 14.

<sup>74</sup> See *Abood*, 431 U.S. at 232; see also *Hudson*, 475 U.S. at 293; *Ellis*, 466 U.S. at 447. The Supreme Court explained in these cases that deducting fees from a nonmember's pay is only constitutional when the fees deducted are proportionate to the benefits derived from the union bargaining for the nonmember and administering the contract.

<sup>75</sup> *North Bay Dev. Disabilities Servs., Inc. v. NLRB*, 905 F.2d 476, 479 (D.C. Cir. 1990), cert. denied, 498 U.S. 1082 (1991). "The Employer in this case voice[d] the concern that it might be charged with an unfair labor practice if it with[held] excessive fees" in reliance on the union-provided amount to be withheld. However, the court concluded that "[t]his apprehension . . . appear[ed] . . . to be unfounded" when the employer had no reason to believe that the fee was unlawful. *Id.*

<sup>76</sup> *Id.*



the employer of its duty to the nonmember employee.<sup>77</sup> If the employer has "reason to believe that the fee was unlawful," and nonetheless agreed to collect this fee, it would be committing an unfair labor practice.<sup>78</sup> Public policy prohibits an employer from intentionally violating a nonmember employee's rights while relying on inherent or express protection for itself.<sup>79</sup> Yet, when excess fees were deducted without knowledge of any wrongdoing, the employer would be protected.<sup>80</sup> Prudent employers would guarantee the protection alluded to by the court by requiring that an express hold harmless provision be included in the final agreement.<sup>81</sup>

### C. Indemnification Provisions as Insurance Policies

Circuit courts have further justified the use of hold harmless clauses between the union and the employer because insurance policies are not violative of public policy, and a hold harmless provision serves the same purpose as an insurance policy for the employer.<sup>82</sup> The fact that public policy dictates that coverage be excluded when an employer intentionally acts in violation of an employee's rights, serves as a deterrent to any

---

<sup>77</sup> See *H.C. Macaulay Foundry Co. v. NLRB*, 553 F.2d 1198, 1201-02 (9th Cir. 1977) (suggesting that the employer cannot intentionally allow an employee's rights to be violated).

<sup>78</sup> *North Bay*, 905 F.2d at 479; see also *Helmsley-Spear, Inc. v. NLRB*, 275 NLRB 262, 268 (1985).

<sup>79</sup> This prohibition is a traditional legal premise, simply stated by Judge Cardozo: "[N]o one shall be permitted to take advantage of his own wrong." *Messersmith v. American Fidelity Co.*, 133 N.E. 432, 433 (N.Y. 1921).

<sup>80</sup> See *North Bay*, 905 F.2d at 479; see also *Solo Cup Co. v. Federal Ins. Co.*, 619 F.2d 1178, 1187 (7th Cir.), cert. denied, 449 U.S. 1033 (1980); *Caplan v. Johnson*, 414 F.2d 615 (5th Cir. 1969); *Union Camp Corp. v. Continental Casualty Co.*, 452 F. Supp. 565, 568 (S.D. Ga. 1978) (likening indemnification to an insurance policy that would prohibit coverage when a claimant's intentional acts create the need for payment).

<sup>81</sup> William F. Kay et al., *Legal Problems in Administering Agency Shop Agreements—A Management Perspective*, 13 J.L. & EDUC. 61, 73-75 (1984) (suggesting the use of hold harmless clauses by an employer to protect itself from union actions over which it has little or no control); see also R. Theodore Clark, Jr., *A Guide to the Changing Court Rulings on Union Security in the Public Sector: A Management Perspective*, 14 J.L. & EDUC. 71, 83 (1985) (suggesting the "[i]nclusion of a 'wall-to-wall' indemnification clause to protect and hold the employer harmless against any and all costs and damages resulting from the employer's implementation of a fair share agreement"); Edwards, *supra* note 68, at 691 (suggesting that the employer bargain for a broad indemnification clause to prevent liability to the employer).

<sup>82</sup> See *Solo Cup*, 619 F.2d at 1187; *Union Camp*, 452 F. Supp. at 568.

incentive the employer may have to violate its duty to the employee.<sup>83</sup>

Commentators have argued that indemnification is not the same as insurance because insurance policies spread the risk and cost to many entities paying insurance and not solely to the union, like the hold harmless clause.<sup>84</sup> However, this argument seems inconsequential because the union owes a duty to the nonmember employee and should be prepared to cover the damages to an employee if this duty is breached.<sup>85</sup> Alternatively, an insurance policy covers only the monetary consequences of accidental damages not caused by any breach of a duty by the insurance company.<sup>86</sup> Spreading the risk is not the intention of the hold harmless clause, because the union is bound by its own duty to the nonmember employee, and the employer simply relies on the union not to breach this duty.<sup>87</sup>

Those opposing the insurance comparison also argue that the possibility of higher premiums from an insurance claim functions as a disincentive to the employer or claimant, whereas hold harmless clauses do not have the same disincentive.<sup>88</sup> However, the costs of litigation, measured in time and loss of morale, discourage an employer from breaching a duty to the employee regardless of a hold harmless provision

---

<sup>83</sup> See *Solo Cup*, 619 F.2d at 1187; *Union Camp*, 452 F. Supp. at 568.

<sup>84</sup> See *Stamford Bd. of Educ. v. Stamford Educ. Ass'n*, 697 F.2d 70, 74 (2d Cir. 1982) (citing *Professional Beauty Supply, Inc. v. National Beauty Supply, Inc.*, 594 F.2d 1179, 1186 (8th Cir. 1979)).

<sup>85</sup> See *Bowen v. United States Postal Serv.*, 459 U.S. 212, 226 (1983) (explaining in general terms the union duty to the employee); see also *Hohe v. Casey*, 956 F.2d 399, 412 (3d Cir. 1992) (describing the union incentive to protect employees' rights). There has been some discussion that if the union is forced to pay for damages to nonmember employees, then the payment may be made using funds collected as dues from these employees. *Stamford*, 697 F.2d at 74. Even if this were true, requiring the union to pay damages would function as a greater incentive to the union to protect nonmembers' rights than would allowing the union to retain the agency fees while requiring the employer to pay the damages. Further, without a hold harmless provision, the payment of damages does not shift to the employer alone because the union is still responsible for its share of the damages. See *Northwest Airlines, Inc. v. Transport Workers Union of Am.*, 451 U.S. 77, 83 (1981). The partial payment would come from the same union source. Therefore, this argument against hold harmless provisions is meritless as the nonmember employee would be made whole regardless of whether the employer or union paid the damages. See *Bowen*, 459 U.S. at 220-24 (1983).

<sup>86</sup> See generally Steven L. Willborn, *Insurance, Public Policy, and Employment Discrimination*, 66 MINN. L. REV. 1003, 1028-29 (1982).

<sup>87</sup> See *Hohe v. Casey*, 956 F.2d 399, 412 (3d Cir. 1992).

<sup>88</sup> *Stamford*, 697 F.2d at 74.

compensating the employer for monetary damages and costs.<sup>89</sup> Further, public policy would prohibit protection by the provision should the breach be intentional.<sup>90</sup> Therefore, employer incentives to protect nonmember employees' rights remain in force despite the limited protection of a hold harmless provision in the agreement.

#### IV. PUBLIC POLICY

In *Weaver*, the Sixth Circuit decided generally that hold harmless provisions regarding fair-share fee arrangements were violative of public policy because, under these agreements, the employer no longer had an incentive to protect the nonmember employees' rights.<sup>91</sup> However, in interpreting Ohio law, the Sixth Circuit has also cautioned that "the violation of public policy is measured by the tendency of the contract to injure the public good rather than by actual injury under particular circumstances."<sup>92</sup> This Comment has attempted to introduce various circumstances under which hold harmless provisions would be in keeping with the public good,<sup>93</sup> protective of nonmember employees' rights,<sup>94</sup> and beneficial to the union-management relationship.<sup>95</sup> Therefore, it is not dispositive that hold harmless clauses, in general, are violative of public policy.

##### A. *The Supreme Court*

The Supreme Court has traditionally held that the exercise of freedom of contract is not to be lightly interfered with, and that it is only "in clear cases that contracts will be held void" as against public policy.<sup>96</sup> Thus, the

---

<sup>89</sup> See HAMILTON, *supra* note 46, at 1148.

<sup>90</sup> *Solo Cup Co. v. Federal Ins. Co.*, 619 F.2d 1178, 1187 (7th Cir.), *cert. denied*, 449 U.S. 1033 (1980); *Union Camp Corp. v. Continental Casualty Co.*, 452 F. Supp. 565, 568 (S.D. Ga. 1978).

<sup>91</sup> *Weaver v. University of Cincinnati*, 970 F.2d 1523, 1538 (6th Cir. 1992), *cert. denied*, 113 S. Ct. 1274 (1993).

<sup>92</sup> *L'Orange v. Medical Protective Co.*, 394 F.2d 57, 60 (6th Cir. 1968).

<sup>93</sup> See *supra* notes 30-32, 43-52 and accompanying text.

<sup>94</sup> See *supra* notes 43-47, 77-81 and accompanying text.

<sup>95</sup> See *supra* notes 59-81 and accompanying text.

<sup>96</sup> *Steele v. Drummond*, 275 U.S. 199, 205 (1927). Though the *Steele* decision was handed down in an era when freedom of contract was considered a substantive right by the Court, its principle continues to be applied today. See *Union Camp Corp. v. Continental Casualty Co.*, 452 F. Supp. 565, 568 (S.D. Ga. 1978); *Greenwood Cemetery, Inc. v.*

circuit courts should uphold hold harmless clauses included in union-management agreements when the provision is created for reasonable and just purposes and when the primary goal is to protect the rights of nonmember employees.<sup>97</sup>

## B. Congress

The *Weaver* court found a shortage of published opinions dealing with the validity of indemnification of a public employer for violations of employees' rights, and therefore, chose to rely on *Stamford Board of Education v. Stamford Education Association*<sup>98</sup> in reaching its decision.<sup>99</sup> In *Stamford*, the Second Circuit held that public policy prohibited hold harmless provisions in collective bargaining agreements that were written to protect an employer from violations of federal civil rights policy.<sup>100</sup> However, the area of law concerning civil rights is vastly different from that pertaining to fair-share fees because, in both the Equal Pay Act and Title VII of the Civil Rights Act, Congress has provided a comprehensive statutory scheme that does not include contribution or indemnification.<sup>101</sup> The Supreme Court has explained that federal common law does not come into play when Congress has provided a "carefully considered legislative program" on a given subject matter.<sup>102</sup> However, Congress has not provided the same type of guidelines for dealing with hold harmless clauses pertaining to fair-share fees. When Congress has been silent on the issue, the Supreme Court has conceded that there is a "modern trend of federal—court decisions favoring contribution"<sup>103</sup> or the payment of a party's

---

*Travelers Indem. Co.*, 232 S.E.2d 910, 914 (Ga. 1977). *See generally*, *Solo Cup Co. v. Federal Ins. Co.*, 619 F.2d 1178 (7th Cir.), *cert. denied*, 449 U.S. 1033 (1980).

<sup>97</sup> The Supreme Court has specified that it is of paramount importance, in a situation in which an employee's rights have been violated by an employer's and the union's breach, for the employee to be made whole. *See Bowen v. United States Postal Serv.*, 459 U.S. 212, 220-224 (1983).

<sup>98</sup> 697 F.2d 70 (2d Cir. 1982).

<sup>99</sup> *Weaver v. University of Cincinnati*, 970 F.2d 1523, 1536 (6th Cir. 1992), *cert. denied*, 113 S. Ct. 1274 (1993).

<sup>100</sup> *Stamford Bd. of Educ. v. Stamford Educ. Ass'n*, 697 F.2d 70, 73 (2d Cir. 1982) (holding that a hold harmless provision allowing for violations of civil rights is prohibited under the Equal Pay Act and Title VII of the Civil Rights Act).

<sup>101</sup> *Northwest Airlines, Inc. v. Transport Workers Union of Am.*, 451 U.S. 77, 97 (1981).

<sup>102</sup> *Id.*

<sup>103</sup> *Id.* at 83.

"share of the common liability."<sup>104</sup> More current cases take this even further, providing a foundation for the argument that federal common law may allow the union to hold an employer harmless for violations of a fair-share fee arrangement.<sup>105</sup> Therefore, contrary to the holding in *Weaver*, public policy may encourage rather than discourage the use of hold harmless provisions in labor agreements.

## V. CONCLUSION

As the *Weaver* court noted, few circuit courts have written decisions concerning the validity of hold harmless provisions pertaining specifically to agency fee deductions.<sup>106</sup> However, nonmember employees as a group are a growing segment of the labor force, and guidelines for protecting these employees are becoming increasingly important in the formation of labor agreements.<sup>107</sup> Currently, the circuit courts disagree over the validity of indemnification clauses between unions and employers.<sup>108</sup> It is essential, however, that this issue be considered within the broad scope of existing labor policy, and that a consensus be reached upon which drafters of labor agreements can rely in penning future labor agreements.<sup>109</sup>

The protection of a nonmember employee's rights is the duty of both the employer and the union.<sup>110</sup> This Comment, therefore, does not advocate that either the union or the employer be relieved of this duty to the nonmember nor imply that either party should be allowed to shift the duty to the other. Instead, it suggests that the duties of both parties can be met even while relying on labor agreements that include hold harmless provisions.

The court in *Weaver* found hold harmless provisions violative of public policy primarily because of the belief that allowing the indemnification provisions would cause the employer to disregard its duty to the nonmember employee.<sup>111</sup> However, since the origin of the agency fee, the

---

<sup>104</sup> *Id.* at 88.

<sup>105</sup> See *supra* notes 29, 40-42, 60-90 and accompanying text.

<sup>106</sup> *Weaver v. University of Cincinnati*, 970 F.2d 1523, 1536 (6th Cir. 1992), *cert. denied*, 113 S. Ct. 1274 (1993).

<sup>107</sup> See *supra* notes 1-17 and accompanying text.

<sup>108</sup> Compare *supra* note 28 with note 29.

<sup>109</sup> See *supra* notes 29-32 and accompanying text.

<sup>110</sup> *Weaver*, 970 F.2d at 1538.

<sup>111</sup> *Id.* at 1538. See generally *Tierney v. City of Toledo*, 824 F.2d 1497 (6th Cir. 1987); *Collins v. City of Detroit*, 780 F.2d 583 (6th Cir. 1986) (prohibiting protection of a public servant not acting in an official capacity on the basis that public policy creates an

courts have held that agency fee cost allocation is the primary duty of the union. *Hudson* provided specific guidelines for informing nonmember employees of union financial data used in calculating agency fee deductions, but did not indicate that this information must also be provided to the employer.<sup>112</sup> Further, in *North Bay*, the D.C. Circuit held that the financial information need only be provided to the employees, specifically excluding the employer as a recipient.<sup>113</sup> Therefore, it would be inconsistent with existing labor policy to find an employer who is legally deprived of agency fee calculation information by the union, responsible for ensuring the accuracy of that fee.

Yet, an employer has a duty when deducting agency fees from the pay of the nonmember, not to deduct an amount that it knows or has reason to know is excessive.<sup>114</sup> This duty exists regardless of whether a hold harmless provision is written into the labor agreement, and regardless of whether union financial information has been provided to the employer.<sup>115</sup> Further, the employer has additional considerations, including loyalty, morale, and time, that work as incentives for the employer to protect the nonmember employees' rights and to avoid litigation.<sup>116</sup>

Therefore, indemnification provisions may allow the union to be made principally, but not solely, responsible for upholding nonmember employees' rights.<sup>117</sup> Most important, hold harmless clauses should be upheld when written to assure that an employee will be made whole should the employee's rights be violated by an agency fee deduction,<sup>118</sup> and when used to protect the union-management relationship.<sup>119</sup>

Karin S. Phalen

---

individual duty).

<sup>112</sup> *Chicago Teachers Union v. Hudson*, 475 U.S. 292, 307 n.18 (1986), *cert. denied*, 111 S. Ct. 2852 (1991).

<sup>113</sup> *North Bay Dev. Disabilities Servs., Inc. v. NLRB*, 905 F.2d 476, 478 (D.C. Cir. 1990), *cert. denied*, 498 U.S. 1082 (1991).

<sup>114</sup> *Id.* at 479.

<sup>115</sup> See *supra* notes 75-81 and accompanying text.

<sup>116</sup> See HAMILTON, *supra* note 46, at 1148.

<sup>117</sup> Compare *Bowen v. United States Postal Serv.*, 459 U.S. 212, 226 (1983) (prohibiting sole responsibility for damages being attributed to one party employer or union) with *Hohe v. Casey*, 956 F.2d 399, 405 (3d Cir. 1992) (holding that the employer can delegate the overseeing of constitutionality to the union) and *North Bay*, 905 F.2d at 479 (making the union principally responsible for the accuracy of agency fee deductions).

<sup>118</sup> *Bowen*, 459 U.S. at 220-24 (explaining that making the employee whole is of principal importance).

<sup>119</sup> See *supra* notes 69-74 and accompanying text.